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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF CHICAGO,
Petitioner,
v.

GREAT LAKES DREDGE & DOCK COMPANY and
JEROME B. GRUBART, INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

SUSAN S. SHER
Corporation Counsel of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
BOBBIE MCGEE GREGG
Assistant Corporation Counsel
Room 610 City Hall
Chicago, IL 60602
(312) 744-5337
Attorneys for Petitioner

THEODORE R. TETZLAFF
RICHARD C. BOLLOW
BARRY SULLIVAN
RUSS M. STROBEL
KENNETH A. KROOT
JEFFREY T. SHAW
JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611
(312) 222-9350
Of Counsel

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

1. Whether the Seventh Circuit erred in holding, in conflict with all other courts of appeals that have addressed the issue since this Court's decision in *Sisson v. Ruby*, 497 U.S. 358 (1990), that in determining whether an activity bears a substantial relationship to traditional maritime activity, the court shall not consider the totality of the circumstances.

2. Whether the Seventh Circuit erred in holding that the Admiralty Extension Act confers maritime jurisdiction over a tort, the impact of which is felt ashore at a time and place remote from any wrongful act committed in navigable waters.

3. Whether the Seventh Circuit erred in its application of the *Sisson* test in this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the City of Chicago, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, at 1a-15a, as modified on the denial of rehearing, App., *infra*, at 18a-20a, is reported at 3 F.3d 225 (7th Cir. 1993). The opinion of the district court, App., *infra*, at 21a-50a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1993, and modified on October 7, 1993. Respondent Jerome B. Grubart, Inc.'s petition for rehearing was denied on October 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U.S. Const. Art. III, § 2:

> The judicial power shall extend . . . to all Cases of admiralty and maritime jurisdiction . . . .

28 U.S.C. § 1333:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Limitation of Vessel Owner's Liability Act, 46 U.S.C. App. § 183(a):

> The liability of the owner of any vessel . . . for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except [in certain cases involving loss of life or bodily injury] exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Admiralty Extension Act, 46 U.S.C. App. § 740:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that

such damage or injury be done or consummated on land.

STATEMENT

A freight tunnel system ("the tunnel") runs beneath the downtown district of the City of Chicago ("the Loop") and crosses under the Chicago River near the Kinzie Street Bridge. In May 1991, the City entered into a contract with respondent Great Lakes Dredge & Dock Company ("Great Lakes"), pursuant to which Great Lakes was to remove and replace the piling clusters at five bridges in the river, including the Kinzie Street Bridge. Great Lakes completed the work in September 1991.

On April 13, 1992, more than six months later, the tunnel collapsed near the Kinzie Street Bridge; and water from the Chicago River entered the tunnel. Numerous buildings in the Loop connected to the tunnel were flooded. Tens of thousands of businesses and individuals who work and live in the Loop have filed more than fifty class-action and individual lawsuits against the City and Great Lakes in the Circuit Court of Cook County, Illinois, alleging that Great Lakes tortiously damaged the tunnel while pile driving and that the City tortiously failed to repair the tunnel in the months between the time Great Lakes completed its work and the time the tunnel flooded. The plaintiffs allege that they were injured both by the tunnel flood and by the subsequent decision to interrupt electrical service to the area.[1] Plaintiffs claim hundreds of millions of dollars in damages. Respondent Jerome B. Grubart, Inc. ("Grubart"), is a plaintiff in the consolidated state court actions.

On October 6, 1992, more than a year after completing work on the tunnel and just one week short of

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[1] The remedial measures that were used to stop the tunnel leak resulted in the closure of the Chicago River. None of the plaintiffs, however, claims to have been injured by the closing of the River to boat traffic.

the six-month statute of limitations, Great Lakes filed a petition in federal district court pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. App. §§ 181-95. In its petition, Great Lakes sought exoneration from or limitation of any liability it may incur from claims arising out of the tunnel flood. It also sought contribution from the City should it be held liable to any of the plaintiffs.

On the motions of the City and Grubart, the district court dismissed the petition for lack of subject matter jurisdiction and for failure to state a claim. App., *infra*, 21a-50a. Applying the guidelines articulated in *Sisson v. Ruby*, 497 U.S. 358 (1990), the court held that it lacked admiralty jurisdiction over Great Lakes' petition because there was no substantial relationship between the activity giving rise to the incident and traditional maritime activity. App., *infra*, at 29a-39a.[2] In reaching its decision, the court applied the totality of the circumstances test described by the Fifth Circuit in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974), and noted by this Court in *Sisson*, 497 U.S. at 365 n.4. *Kelly* outlined four factors for the court to consider in determining whether there is a substantial relationship between the activity giving rise to the incident and traditional martime activity: (1) the functions and role of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and (4) traditional concepts of the role of admiralty law. See 485 F.2d at 525.

The Seventh Circuit reversed, holding that there was jurisdiction, and remanded the case for further proceedings. App., *infra*, at 1a-15a. The court of appeals held that the district court erred in using *Kelly*'s totality of the

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[2] In addition, the court found that Great Lakes' petition failed to state a claim upon which relief could be granted because Great Lakes was foreclosed, as a matter of law, from limiting its liability under the Limitation Act. App., *infra*, at 43a-49a.

circumstances test to determine whether there was a substantial relationship between the activity giving rise to the incident and traditional maritime activity. App., *infra,* at 6a-7a. Instead, the court stated that *Sisson* required it to limit its analysis:

> After *Sisson,* in ascertaining the existence of admiralty jurisdiction we ask three questions about the incident giving rise to the alleged wrong: (1) did it occur on the navigable waters of the United States? (2) did it pose a potential hazard to maritime commerce? and (3) was it substantially related to traditional maritime activity?

App., *infra,* at 6a.

Using this test, the Seventh Circuit began with the locality requirement and held that the alleged tort in this case was "the negligent driving of pilings into the riverbed," App., *infra,* at 7a-8a, and that this wrong occurred in navigable waters, App., *infra,* at 8a. The City had argued (App., *infra,* at 8a) that the injury in this case—flooding of buildings in the Loop—was on land, at a time and place too remote from Great Lakes' alleged wrongful conduct to satisfy the locality requirement. See *Gutierrez v. Waterman S.S. Corp.,* 373 U.S. 206, 210 (1963). Relying on the Admiralty Extension Act, 46 U.S.C. App. § 740, the court below rejected this argument.

> We believe that the requirement of temporal proximity is nothing more than a specialized rule of proximate causation. And we do not believe that the elapse of six months, the period of time between Great Lakes' completion of its work and the flood, bars application of the Admiralty Extension Act.

App., *infra,* at 8a. The court held that the incident in this case satisfied the locality requirement of admiralty jurisdiction.

Turning to the nexus requirements, the court examined first whether the incident posed a potential hazard to maritime commerce. The court concluded that the installation of pilings in the Chicago River did pose such a hazard "[b]ecause commerce on the river was *actually* disrupted for more than a month." App., *infra*, at 10a (emphasis in original).

As to the second nexus requirement, the court considered whether the activity in which Great Lakes was involved was substantially related to traditional maritime activity. The court concluded that sinking pilings in the Chicago River was related to maritime activity because one purpose of the pilings was to aid navigation. App., *infra*, at 10a-11a.

Grubart's petition for rehearing with suggestion for rehearing en banc was denied, although the court granted Grubart's motion for a stay of the mandate pending the filing of its petition for certiorari to and including November 15, 1993. Grubart filed its petition (No. 93-762) on that date.

REASONS FOR GRANTING THE PETITION

Historically, admiralty jurisdiction over tort actions was determined by application of a locality test. "The historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 (1971). Starting with the decision in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), and culminating with the decision in *Sisson v. Ruby*, 497 U.S. 358 (1990), this Court added to the locality test a nexus test that measures: (1) whether the general features of the type of incident involved have the potential to disrupt commercial maritime activity and (2) whether the general character of the activity giving rise to the incident

bears a substantial relationship to traditional maritime activity. See *Sisson*, 497 U.S. at 363-65.

In this case, neither the locality nor nexus requirements for admiralty jurisdiction have been satisfied. The incident at issue—the flooding of building basements in the Loop on April 13, 1992—did not occur on navigable waters and, in general, did not have the potential to disrupt commercial maritime activity. Similarly, the activity giving rise to the incident—the operation and maintenance of an underground tunnel—does not bear any substantial relationship to traditional maritime activity. Notwithstanding that none of the jurisdictional requirements articulated in *Sisson* was satisfied in this case, the court of appeals concluded that admiralty jurisdiction lies.

That decision warrants the plenary review of this Court. The Seventh Circuit articulated a test for determining federal admiralty jurisdiction that conflicts with the test employed by five other courts of appeals and with prior decisions of this Court, including *Sisson*. The decision below also raises fundamental and recurring questions concerning the scope of federal admiralty jurisdiction that should be addressed by this Court, particularly given that the Seventh Circuit's resolution of the issues was manifestly incorrect. Finally, the Seventh Circuit's decision raises substantial federalism questions because state tort law is ousted in any case within the admiralty jurisdiction. See, *e.g.*, *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). As a result, if the decision below stands, tens of thousands of quintessential state tort claims now pending in state court will be tried in federal court under federal common law with virtually no possibility that the rules of decision, or the outcome, will be the same. Thus, although the decision below is interlocutory, judicial economy and sound federal/state relations dictate review of the jurisdictional decision at this time, before a federal district court, while holding the state court proceedings at bay, commits years to the trial of this case, the outcome of

which will be meaningless if the Seventh Circuit's jurisdictional decision is ultimately reversed.

1. In *Sisson v. Ruby*, this Court articulated a two-part nexus test for determining whether the admiralty jurisdiction of the federal courts may be invoked in an action arising out of a tort that occurred on the navigable waters of the United States: (1) the general features of the type of incident involved must have the potential to disrupt commercial maritime activity, and (2) the general character of the activity giving rise to the incident must bear a substantial relationship to traditional maritime activity. See 497 U.S. at 363-65. This Court noted that the courts of appeals had articulated different approaches—including the *Kelly* test—to determine whether an activity is substantially related to traditional maritime activity, but found it unnecessary to choose among any of those tests. See *id.* at 365-66 n.4. The Court concluded that its two-part test alone provided sufficient guidance, "at least in cases in which all of the relevant entities are engaged in similar types of activity." *Ibid.* The Court acknowledged that "[d]ifferent issues may be raised by a case in which one of the instrumentalities is engaged in a traditional maritime activity but the other is not. Our resolution of such issues awaits a case that squarely raises them." *Id.* at 365 n.3.

Following *Sisson*, all the courts of appeals that have addressed this issue—except the Seventh Circuit in this case—continued to use the four-factor *Kelly* test in analyzing whether a tort was substantially related to traditional maritime activity in cases where at least some of the "relevant entities" were not engaged in maritime activity.[3] See *Whitcombe v. Stevedoring Services of America*, 2 F.3d 312, 315 (9th Cir. 1993) (applied modified *Kelly* test and held no admiralty jurisdiction where cargo was dam-

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[3] Grubart, for example, was plainly engaged in no maritime activity, nor was any of the other plaintiffs.

aged on land before being loaded onto seagoing vessel);[4] *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260, 1263 (9th Cir. 1993) (applied modified *Kelly* test and held no admiralty jurisdiction where swimmer was injured while diving from private pleasure boat in navigable waters); *Penton v. Pompano Construction Co.*, 976 F.2d 636, 641-42 (11th Cir. 1992) (applied *Kelly* test and held no admiralty jurisdiction where construction worker was injured while unloading crane from barge in navigable waters after maritime construction project completed); *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 602 (3d Cir. 1991) (applied *Kelly* test and held admiralty jurisdiction lies where scuba diver was injured diving from commercial pleasure vessel in navigable waters); *Cochran v. E.I. du-Pont de Nemours*, 933 F.2d 1533, 1537 (11th Cir. 1991) (applied *Kelly* test and held no admiralty jurisdiction where seaman contracted lung disorder from long-term exposure to irritants), cert. denied, 112 S. Ct. 881 (1992); *Palmer v. Fayard Moving & Transportation Corp.*, 930 F.2d 437, 440 (5th Cir. 1991) (applied *Kelly* test and held admiralty jurisdiction lies where employee was injured while descending a ladder on a commercial pleasure vessel in navigable waters); *Price v. Price*, 929 F.2d 131, 135 (4th Cir. 1991) (applied *Kelly* test and held admiralty jurisdiction lies where passenger was injured while disembarking private pleasure boat in navigable waters); *Broughton v. Offshore Drilling, Inc. v. South Central Machine, Inc.*, 911 F.2d 1050, 1052 (5th Cir. 1990) (applied *Kelly* test and held admiralty jurisdiction lies where barge buoyancy mat was damaged in navigable waters). See also *Eagle-Picher Industries, Inc. v. United States*, 937 F.2d 625, 633 n.7 (D.C. Cir. 1991) (noting that "[m]ost circuits addressing this question have employed a test first set forth in *Kelly v. Smith*." (citations omitted)).

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[4] The modified *Kelly* test omits from the third factor any consideration of the cause of the injury; *Sisson* advises against consideration of causation in determining jurisdiction. See, *e.g.*, *Whitcombe*, 2 F.3d at 315.

Indeed, the district court in this case applied the *Kelly* test and concluded that there was no admiralty jurisdiction. App., *infra,* at 32a. The Seventh Circuit, however, rejected the *Kelly* test, opining: "We believe that, following *Sisson,* the jurisdictional inquiry must be much more rigidly structured than this. A court may not engage in the sort of policy analysis that apparently informed the district court's decision." App., *infra,* at 7a.

The conflict among the courts of appeals demonstrates that this Court should now address the question reserved in *Sisson,* see 497 U.S. at 365-66 nn. 3-4, whether additional factors should be part of the test for determining the scope of admiralty jurisdiction when not all of the relevant entities are engaged in traditional maritime activities. The federal courts are still grappling with the recurring question how to determine when such cases involve a substantial relationship to traditional maritime activity. The Seventh Circuit's test excludes consideration of any additional factors, including the function and role of the parties and traditional concepts of the role of admiralty law. Indeed, the court below specifically rejected what it called the "policy analysis" that *Kelly* and the host of cases following it permit. That approach is at odds with the law in five other circuits. And these other courts are plainly correct. As this Court noted in *Sisson,* the jurisdictional inquiry cannot be divorced from the purpose that supports the exercise of jurisdiction—the need for a uniform federal rule to protect maritime commerce. 497 U.S. 364 at n.2.

Here, although Great Lakes argues that it is involved in traditional maritime activity, it does not explain why it needs a uniform federal rule to guide its conduct in pile driving. Nor does it even argue that any of the other entities is engaged in traditional maritime commerce. The plaintiffs in the pending state court actions own or operate properties in the Loop. They range from Fortune five

hundred companies to hourly employees of small businesses, but they all share one common feature: not a single one is involved in traditional maritime activity. Most of the City of Chicago's activities relevant to this case—centering on the operation and maintenance of an underground tunnel—also are not traditional maritime activities. In a case such as this, the Seventh Circuit's concededly "rigidly structured" inquiry, App., *infra*, at 7a, leads to the anomalous result that persons injured when the City's tunnel flooded basements in the Loop are hailed into federal court to present their land-based tort claims in an admiralty action. That decision amply warrants review by this Court.

2. The Seventh Circuit's decision also extends the scope of maritime law further than this Court has approved. In answering the threshold locality question, the court below relied on the Admiralty Extension Act, which provides that admiralty jurisdiction "shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consumated on land." 46 U.S.C. App. § 740. The Seventh Circuit's decision that this Act provides admiralty jurisdiction in this case, App., *infra*, at 8a, despite the fact that all the injuries occurred on land at a time and place remote from Great Lakes' wrongful conduct on navigable waters, extends the reach of maritime law to an unprecedented scope and compels a federal rule of decision for the type of case traditionally governed by state law.

This Court's discussions of the reach of the Admiralty Extension Act in *Gutierrez v. Waterman S.S. Corp.* 373 U.S. 206 (1963), and *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971), are instructive. In *Gutierrez*, this Court concluded that admiralty jurisdiction was properly invoked pursuant to section 740 over the claim of a longshoreman who slipped on beans spilled on the dock

while unloading a vessel in navigable waters. This Court held:

> We think it sufficient for the needs of this occasion to hold that the case is within the maritime jurisdiction under 46 U.S.C. § 740 when, as here, it is alleged that the shipowner commits a tort while or before the ship is being unloaded, and *the impact of which is felt ashore at a time and place not remote from the wrongful act.*

373 U.S. at 210 (emphasis added). Conversely, in *Victory Carriers,* this Court concluded that admiralty jurisdition was not properly invoked over the claim of a longshoreman injured by the forklift he was using to move cargo from a warehouse to a point on the dock alongside a vessel in navigable waters. 404 U.S. at 204. In denying the claimed admiralty jurisdiction, the Court noted:

> We are not inclined at this juncture to disturb the existing precedents and to extend shoreward the reach of the maritime law further than Congress has approved. We are dealing here with the intersection of federal and state law. As the law now stands, state law has traditionally governed accidents like this one. To afford respondent a maritime cause of action would thus intrude on an area that has heretofore been reserved for state law, would raise difficult questions concerning the extent to which state law has been preempted, and would furnish opportunity for circumventing state workmen's compensation statutes. In these circumstances, we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of federal courts.

Id. at 212.

In this case, the City relied on *Gutierrez* for its argument that section 740 did not support admiralty jurisdiction because the impact of Great Lakes' wrongdoing was felt ashore at a time and place too remote from any

wrongful act on navigable waters. The Seventh Circuit rejected this argument, construing this Court's holding in *Gutierrez* as "nothing more than a specialized rule of proximate causation." App., *infra*, at 8a. In this the court plainly erred, for the requirement that the injury not be remote in time and place from a maritime tort is not merely a question of proximate causation, but rather a jurisdictional limitation on the federal courts. See *Victory Carriers*, 404 U.S. at 212.

The Seventh Circuit's error is symptomatic of the difficulty the lower courts have had in applying the remoteness rule; as the Eleventh Circuit has noted, "[t]he cases have not developed any articulable standard by which to determine when an injury is too remote in time and place from traditional maritime activity to satisfy admiralty jurisdiction." *Crotwell v. Hockman-Lewis, Ltd.*, 734 F.2d 767, 769 (11th Cir. 1984). That difficulty in addressing this recurring issue of admiralty law is yet another reason why the decision below merits plenary review.

What is more, the Seventh Circuit compounded its error by ignoring the federalism implications of its decision, in contravention to this Court's admonition in *Victory Carriers* to "proceed with caution" at the intersection of federal and state law. 404 U.S. at 212. The Seventh Circuit's expansive view of federal admiralty jurisdiction undermines critical policies found in state tort law. The Illinois Local Governmental and Governmental Employees Tort Immunity Act ("Tort Immunity Act"), 745 ILCS paras. 10/1-101 to 10-101 (1992), grants the City sovereign immunity from liability to persons injured by the tunnel flood, and the City has asserted its immunity in the pending state court actions. Yet this Court in *Workman v. Mayor of New York*, 179 U.S. 552 (1900), rejected a municipality's assertion of sovereign immunity as a defense in admiralty, holding that federal law applies. Consequently, recognition of a maritime cause of action in this case intrudes, as in *Victory Carriers*, on areas

traditionally reserved for state law—here, the scope of the duties owed in tort to avoid flooding another's land and the scope of state-law governmental tort immunities.

This result is both unjust and unnecessary. It is unjust because extending admiralty jurisdiction in this case may ultimately shield Great Lakes from liability for the hundreds of millions of dollars that persons injured by the tunnel flooding have sought. Great Lakes has alleged that the Limitation of Vessel Owner's Liability Act, 46 U.S.C. App. §§ 181-95, limits its liability to the $600,000 value of the two barges and one tug that it used to perform the pile driving because the loss was occasioned "without the owner's privity or knowledge." *Id.* § 183(a). At the same time, Great Lakes has already argued in the state court proceedings that, as a result of the Seventh Circuit's decision, the City is stripped of its state law immunity. Thus, the court below has exposed the City, and its taxpayers, to an extraordinary liability, which the Illinois General Assembly intended to preclude under the Tort Immunity Act. See 745 ILCS para. 10/1-101.1 (a) (1992) ("The purpose of this Act is to protect local public entities and public employees from liability arising from the operation of government.").

This outcome is unnecessary because no federal interests are implicated that require such an unprecedented extension of the reach of admiralty jurisdiction. In determining the boundaries of admiralty jurisdiction, this Court historically seeks to effectuate the "fundamental interest giving rise to maritime jurisdiction [which] is 'the protection of maritime commerce.' " *Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S. Ct. 2071, 2074-75 (1991) (citations omitted). But no interest of maritime commerce is present in this case—no vessel was damaged, no seaman was injured, no injury occurred on navigable waters. As the district court aptly summarized, in rejecting Great Lakes' claim of admiralty jurisdiction:

> Simply put, we have land-based injuries caused by land-based activities undertaken upon a non-moving vessel on a river acting as a stationary work platform. The maritime connection of the principal activities is neither direct nor material and suppl[ies] none of the causation for the alleged injuries. There are no traditional maritime concerns present here and, without [them], no admiralty jurisdiction.

App., *infra.*, at 37a-38a.

Conversely, the state interest in affording injured plaintiffs a remedy through an action in tort is self-evident. See, *e.g., English v. General Electric Co.*, 496 U.S. 72 (1990). And the state interest in preserving governmental tort immunities is no less important. In Illinois, the state constitution delegates to the Illinois General Assembly the power to determine the scope of municipal sovereign immunity. Ill. Const. art. XIII, § 4. The General Assembly has exercised that power by enacting the Tort Immunity Act. See, *e.g., Burdinie v. Village of Glendale Heights,* 565 N.E.2d 654, 660 (Ill. 1990). The Seventh Circuit should have recognized these state interests at stake in the resolution of the largest tort action ever filed against the City of Chicago, and likely one of the largest ever filed against any state or local government.

Accordingly, this is no occasion for an expansive reading of the Admiralty Extension Act. "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined." *Victory Carriers,* 404 U.S. at 212 (citation omitted). The role of federalism in admiralty law, which is plainly implicated by this case but which the Seventh Circuit did not even mention, is one that can only be vindicated by plenary review of the decision below.

3. The Seventh Circuit's decision also reflects a grave misunderstanding of the guidelines announced in *Sisson* and their proper application to a case like this one. The test described in *Sisson* requires consideration of (1) whether "the general features of the type of incident involved [make the] incident . . . likely to disrupt commercial [maritime] activity," 497 U.S. at 363, and (2) whether "the activity giving rise to the incident" bears a "substantial relationship [to] traditional maritime activity," *id.* at 364. Although purporting to apply this test, the Seventh Circuit instead reformulated it in fundamental respects and created a new approach to determining whether admiralty jurisdiction should be invoked over state tort actions.

With regard to the first part of the *Sisson* test—"the general features of the type of incident involved"—this Court in *Sisson* described the incident as "a fire that began on a noncommercial vessel at a marina located on a navigable waterway." 497 U.S. at 362. This Court then concluded that the general features of this type of incident—"a fire on a vessel docked at a marina on navigable waters"—was likely to disrupt comercial maritime activity. *Id.* at 363.

The Seventh Circuit, however, described this test in terms of "the incident giving rise to the alleged wrong." App., *infra*, at 6a. Thus, the court focussed on the cause of the incident and not the incident itself. This distinction is crucial. In this case, it is the difference between the allegedly tortious flooding of land and the cause of that flooding, which the court below identified as "the installation of piling from barges." App., *infra*, at 9a. The "general features of type of incident involved," however, can only be accurately described as the flooding of building basements in a downtown business district.

The error of the court of appeals' approach is easily seen by reference to *Sisson* itself. Under the Seventh Cir-

cuit's test, the Court in *Sisson* would have been concerned with the cause of the fire, not the fire itself. Yet, this Court noted in *Sisson* that the jurisdictional inquiry should not "turn on the particular facts of the incident in this case, such as the source of the fire." 497 U.S. at 363. Indeed, under the Seventh Circuit's test, *Sisson* would have come out the other way; this Court would not likely have concluded that the cause of the fire—a defective washer/dryer unit on a private pleasure vessel—posed a potential hazard to commercial maritime activity. This shift in focus by the court below also skews the outcome in this case: the installation of pilings from barges has the potential to disrupt maritime commerce; the flooding of building basements plainly does not.

With regard to the second part of the *Sisson* test—whether the activity giving rise to the incident bears a substantial relationship to traditional maritime activity—the court below also took too narrow a focus. The court identified the activity at issue as 'the sinking of pilings into a riverbed" and not surprisingly held that this activity was substantially related to traditional maritime activity. App., *infra,* at 10a. *Sisson,* however, teaches "that the relevant 'activity' is defined not by the particular circumstances of the incident, but by the general conduct from the incident arose." 497 U.S. at 364. The Court noted that it "need not ascertain the precise cause of the fire to determine what 'activity' Sisson was engaged in; rather, the relevant activity was the storage and maintenance of a vessel at a marina on navigable waters." *Id.* at 365. Thus, in this case the activity giving rise to the incident—the flood—was not the pile driving, which occurred some seven months before the flood, but the operation and maintenance of an underground tunnel. Indeed, the failure to repair the tunnel is at the heart of the plaintiffs' claim against the City, see App., *infra,* at 23a, and had the breach in the tunnel been repaired before April 13, 1992, the plaintiffs would not have been injured

at all.[5] The failure to repair the tunnel is not substantially related to traditional maritime commerce.[6]

Again, reference to *Sisson* makes the court of appeals' error readily apparent. Under the Seventh Circuit's narrow vision, the activity giving rise to the incident in *Sisson*—the fire—would have been the first negligent act that ultimately resulted in the tortious incident—the installation of a defective washer/dryer unit on a pleasure yacht. But in holding that the relevant activity was the storage and maintenance of the vessel at the marina, this Court specifically rejected an approach so limited in time and so divorced from the threat to maritime commerce. The defect in the washer/dryer mattered little until the yacht was docked at the marina and the defect caused a fire. Again, under the Seventh Circuit's test, *Sisson* would have come out differently. The installation of a washer/dryer in a pleasure yacht does not bear a substantial relationship to traditional maritime activity.

As to both the "incident" involved and the "activity giving rise to the incident," the court below asked a more

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[5] In determining whether tort admiralty jurisdiction lies, the *Sisson* determination of what activity gave rise to the incident is not at all analogous to the tort law determination of what activity proximately caused the incident. As this Court noted in *Sisson*, "[w]ere courts required to focus more particularly on the causes of the harm, they would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdiction question." 497 U.S. at 365. Thus, although Great Lakes' negligent pile driving was the proximate cause of the tunnel flood, it was not "the general activity from which the incident arose."

[6] Great Lakes itself has framed this case to focus on land-based activities. Its admiralty petition alleges that the City is solely responsible for the flood and all of the damage that resulted. Great Lakes' account of this case—that all plaintiffs were injured solely by the City's failure to maintain and repair the tunnel—is at odds with the Seventh Circuit's decision identifying Great Lakes' pile driving as the only relevant conduct.

specific question than *Sisson* allows. If the Seventh Circuit had applied *Sisson* properly, it would have concluded that the incident—flooding of building basements—had no significant potential to disrupt commercial maritime activity, and that the activity giving rise to the incident—the operaton and maintenance of a underground tunnel—bore no substantial relationship to traditional maritime activity. Indeed, in this respect, this case is analogous to *Executive Jet* because any connection to navigable waters is fortuitous and incidental. See 409 U.S. at 273. In such a case, "the [state] courts could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of [state] law without any effect on maritime endeavors." *Ibid.*

4. The questions presented by this case are of extraordinary importance to the taxpayers of the City of Chicago and the persons injured by the tunnel flood. If this petition for certiorari is denied, the case will proceed on the merits in admiralty jurisdiction. The plaintiffs' tort claims and the City's claim for contribution against Great Lakes currently pending in state court will be stayed. Plaintiffs face the possibility that their remedy against Great Lakes will be limited to the value of the vessels involved, while the City faces the possibility that its state law immunities will not be honored. Thus, the plaintiffs and the City will have ample reason to appeal from the judgment in this case, whatever it is. Sound practices of judicial economy militate in favor of review of the Seventh Circuit's decision now, in the early stages of this massive litigation, while the expense and delay of a federal action, which will waste enormous resources if the decision below is ultimately repudiated, can be avoided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SUSAN S. SHER
Corporation Counsel of
the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation
Counsel
BOBBIE MCGEE GREGG
Assistant Corporation Counsel
Room 610 City Hall
Chicago, IL 60602
(312) 744-5337
Attorneys for Petitioner

THEODORE R. TETZLAFF
RICHARD C. BOLLOW
BARRY SULLIVAN
RUSS M. STROBEL
KENNETH A. KROOT
JEFFREY T. SHAW
JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611
(312) 222-9350
Of Counsel

* Counsel of Record

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